IN THE SUPREME COURT OF MISSOURI

No. S.C. 85115

WILLIAM GOMEZ
Respondent-Appellant,

vs.

CONSTRUCTION DESIGN, INC.
Appellant-Respondent

Appeal from the Circuit Court of Jackson County, Missouri
Division 3
Hon. Lee E. Wells

SUBSTITUTE RESPONDENT/REPLY BRIEF

Douglas N. Ghertner #22086
SLAGLE, BERNARD & GORMAN, P.C.
4600 Madison Avenue, Suite 600
Kansas City, Missouri 64112-3012
Phone: (816) 410-4600
Fax: (816) 561-4498
E-Mail: dghertner@sbg-law.com

John M. Graham, Jr. #46684
LAW OFFICES OF STEPHANIE WARMUND
9200 Ward Parkway, Suite 300
Kansas City, Missouri 64114
Phone: (816) 361-7917
Fax: (816) 523-8682
ATTORNEYS FOR APPELLANT-RESPONDENT CONSTRUCTION DESIGN, INC.

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(1) THIS CLAIM WAS NEITHER PLEADED NOR PRESENTED TO THE TRIAL COURT IN ANY WAY; AND

(2) NO EVIDENCE WAS PRESENTED TO OR PROPERLY PLACED BEFORE THE TRIAL COURT ON THIS ISSUE;

THEREFORE, THERE IS NOTHING IN THE RECORD ON THIS ISSUE THAT HAS BEEN PRESERVED FOR APPELLATE REVIEW

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REPLY BRIEF

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(1) PLAINTIFF'S FAXED FILING OF HIS ACCEPTANCE OF THE PROPOSED REMITTITUR WAS VOID; AND

(2) THE TRIAL COURT'S MAY 24, 2001 ORDER CONDITIONALLY GRANTING DEFENDANT A NEW TRIAL BECAME THE FINAL JUDGMENT OF THE COURT DEPRIVING THIS COURT OF ANY JURISDICTION

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(1) THIS CLAIM WAS NEITHER PLEADED NOR PRESENTED TO THE TRIAL COURT IN ANY WAY;

(2) THERE WAS NO EVIDENCE PRESENTED TO OR PROPERLY BEFORE THE TRIAL COURT ON THIS ISSUE; AND

(3) THERE IS NOTHING IN THE RECORD ON THIS ISSUE PRESERVED FOR APPELLATE REVIEW

Marc's Restaurant Inc. v. CBS, Inc., 730 S.W.2d 582, 584 (Mo.App. E.D. 1987)

McDonald v. Thompson, 35 S.W.3d 906 (Mo.App. S.D. 2001)

Stan Cushing Const. v. Cablephone, Inc., 816 S.W.2d 293, 295 (Mo.App. S.D. 1991)

REPLY TO STATEMENT OF FACTS

While CDI certainly does not adopt Gomez' statement of facts, it will only address at this time certain statements that either leave a false impression or are without support in the record and transcript.

Gomez' statement of facts and substitute brief have embellished and gone outside of the record, ignored certain parts of the record and even obscured and slanted the evidence in furtherance of his theme that a new trial is not warranted in this case and that the trial court erred in granting a remittitur. Gomez seeks to be excused from the trial court's instructional plain error and to keep his ill-gotten windfall in spite of the untimely filing of his Acceptance of Remittitur, the trial court's improperly admitted evidence of post-accident remedial measures, his failure to make a submissible jury case, and the resulting erroneous jury verdict which was the product of bias, passion and prejudice that cannot be corrected by remittitur. Acceptance of Gomez' assertions of fact and what he believes is the record in this case would make a finding of any trial court error in this case virtually impossible.

The liberties taken by Gomez in his substitute brief with both the evidence presented during trial and the testimony of witnesses are numerous, frequent, and designed to fit the theory of the submissibility of his case and justification of the jury award of damages require further identification. A line-by-line dissection of Gomez' substitute brief would scarcely be

productive; instead, CDI will here highlight a few of the more obvious distortions contained in his presentation.

- Gomez' statement of facts conveniently omits any reference to the fact that his pleading, proof and closing argument clearly demonstrate that the case was obviously pled and tried on specific negligence only and that the only proof presented at trial was in conformity therewith.[1]
- More interestingly, Gomez' statement of facts, just as in his counsel's closing argument, points to a number of specific omissions on the part of CDI's employees which are urged to constitute negligence on the part of CDI without any mention of the doctrine of *res ipsa loquitur*. Having pled and tried his case on real and precise causes of his injury, Gomez could not submit under *res ipsa loquitur* and the doctrine of *res ipsa loquitur* was not available to him. Nonetheless, this statement of facts fails to address this very important evidentiary issue raised by CDI in this appeal.
- Gomez states that his supervisor, Glenn Frost, (Sub. Br. 17) identified the accident scene area with the aid of a videotape made a day after the accident but fails to inform the Court that the scene included a bright yellow **"CAUTION"**

[1]However, Gomez later in his substitute brief (Sub. Br. 67) judicially admits that he proved the real and precise causes of his injury, and, therefore, he could not submit his case under the *res ipsa loquitur* doctrine.

tape in, over and around the entire area where he fell (Plaintiff's Exhibit 46). In addition, Gomez references transcript testimony of CDI's employees but fails to inform the Court that none of this testimony was presented or came into evidence in Gomez' portion of the case. In fact, there was no testimony presented in Gomez' portion of the case from CDI or any of its employees and Gomez failed to establish the necessary elements of any cause of action against CDI for negligence and damages in his portion of the case.

- Additional reediting of the record by Gomez can be found from references in his substitute brief to the medical evidence. Dr. Abrams, Dr. Kuhn, Dr. Egea and Dr. Mouille, all expert medical witnesses who testified for Gomez, never opined that he was permanently disabled. Further, there was no testimony presented by Dr. Abay, another medical expert called by Gomez, or Dr. Abrams that he would need further back surgery. In fact, Dr. Abrams testified that Gomez was not disabled and that he believed that there existed a medical controversy as to the results of any head injury in terms of his cognitive functioning (Plaintiff's Exhibit 56). None of the medical witnesses called at trial on behalf of Gomez or CDI ever provided any evidence or testimony of medical expenses or the reasonableness or necessity of medical expenses incurred by Gomez as a result of his accident. Future wage loss, medical care and expenses and other economic loss were also left to the speculation and conjecture of the jury and

no amount of damages was ever requested in Gomez' closing argument. Yet, typically, Gomez remains undaunted by the lack of proof as to such evidence and persists in his blind adherence to these discredited viewpoints.

- Gomez' substitute brief and statement of facts omit any reference to the testimony of Dr. Charles Donahoe (Defendant's Exhibit 102), Mitchell A. Woltersdorf, Ph.D. (Defendant's Exhibit 100) and Denise Cowan, Ph.D., (Tr. 365-419), all medical experts called by CDI. Dr. Donahoe found Gomez to be 17% permanently disabled and testified that he could return to work (Defendant's Exhibit 102, [pgs. 22-23] and Exhibit 103). Dr. Woltersdorf, a neuropsychologist, testified that Gomez had a mild traumatic brain injury from his accident but would have no problem returning to work (Defendant's Exhibit 100 [pgs. 21, 26], Defendant's Exhibit 101). Dr. Cowan, a psychologist, testified that Gomez suffered a mild head injury with mild impairment from the accident, that he demonstrated significant improvement of his cognitive functions since the accident and that he could return to work (Tr. 380).
- While admitting that following his accident Gomez obtained court approved custody of his 3 year old minor daughter (born 3 years after his accident), it is implied by references to the transcript in his substitute brief that his custody and ability to care for his daughter as the custodial parent are only related to the proximity of his home to other family members (Sub. Br. 21-22). These

references to the transcript are incomplete and not accurate. The evidence at trial was that Gomez was awarded legal custody of his minor daughter following a contested custody dispute (Tr. 322-323), that he spends considerable time with his daughter (Tr. 107), with custody five days a week (Tr. 323), that he cares for and plays with his minor daughter on a daily basis and drives her wherever she needs to go (Tr. 107). This conveniently omitted evidence is clearly inconsistent with a person having moderate brain damage and a significantly diminished ability to think, concentrate or remember. Gomez' reference to Dr. Mouille's testimony in the transcript in this regard is simply incorrect and false.

- The statement in Gomez' substitute brief and the transcript reference that "Mr. Gomez's doctors indicated a need for life-long follow-up medical care every four months with additional periodic testing" (Sub. Br. 22) is belied by the record. To the contrary, Gomez testified at trial that he was not currently undergoing treatment except for routine follow-up visits every four months with his family doctor, Dr. Kuhns, and that he was not taking any medication (Tr. 316). The statement contained in Gomez' substitute brief that his doctors indicated that his condition would not improve and would only deteriorate (Sub. Br. 22) is not true and is unsupported by any transcript reference. Noticeably absent from his substitute brief is any reference to Dr. Abrams' testimony that

Gomez was employable (Plaintiff's Exhibit 56) or that CDI's expert Dr. Cowan testified that Gomez had demonstrated significant improvement of his cognitive functions and could return to work at a position cognitively similar to what he had held before (Tr. 380).

- Gomez' creative reediting of the record reaches perhaps new heights at page 19 of his substitute brief when purporting to paraphrase the Court's transcript of page 62 to the effect that "[i]t is undisputed that Construction Design Inc.'s employees were in control" of the accident scene. This is again repeated with disingenuousness at page 20 of the substitute brief where, it is suggested without any reference to the record, that the implication from this portion of the transcript somehow translates into the fact that control was undisputed and not an issue which needed to be addressed by the jury. This is just one of many examples of statements of facts that are false, wrenched out of context and invalid being twisted to fit Gomez' theory of the case.

- Furthermore, Gomez' substitute brief contains numerous references to post-trial allegations that are unsupported by the transcript and are not part of the Court's record on appeal in this case. Additionally, even where a post-trial event is part of the record it has been misstated. Specifically, on May 17, 2001, the Circuit Court Clerk, Carol S. Buchanan, Sr./Visiting Judge's Law Clerk, did not fax (Sub. Br. 23) but instead, mailed to the parties the Court's Order, dated May

15, 2001, which overruled CDI's Motion for Judgment Notwithstanding the Verdict and Sustained CDI's Motion for a New Trial or in the Alternative for Remittitur. Gomez also fails to mention that the May 15, 2001 Order (L.F. 48-49) required and mandated that Gomez file (not fax) a written acceptance of the remittitur amount by 4:30 p.m. on Thursday (sic), May 25, 2001 (emphasis added). This order was followed by an Amended Order dated May 24, 2001 that was faxed to the parties after the Court recognized and corrected its previously mailed order to show that May 25, 2001, was a Friday and not a Thursday. Except for this one change, the Amended Order dated May 24, 2001 (L.F. 50-51) was identical to the May 15, 2001 Order (L.F. 48-49) in every other respect and it was the only faxed order entered in this case. Accordingly, both of these Orders speak for themselves and Gomez' attempted commentary and interpretive reading as to what the trial court contemplated or implied is highly improper, argumentative and incorrect. Moreover, there is nothing in the record or legal file before this Court that supports the assertion made by Gomez that "Judge Wells accepted the faxed notice of acceptance of remittitur" (Sub. Br. 23-24) before the ordered deadline or that somehow this obviously late filed acceptance satisfied the requirement of the Amended Order. The record is devoid of any support for this statement and the only record in the Legal File is the certificate of service executed by Gomez' counsel showing that this

acceptance was mailed May 25, 2001 and the Court's Legal File showing that it was filed May 31, 2001 (L.F. 52). Clearly, Judge Wells was under a mistaken understanding that Gomez' written acceptance had been timely filed when he entered his Amended Order of May 31, 2001 (L.F. 53). However, the record before the Court on this appeal obviously demonstrates that Judge Wells was wrong and that plaintiff's written acceptance was filed May 31, 2001 (L.F. 52). Whether or not his faxed notice was "accepted" is neither a fact supported by the record in this case nor is it a significant issue here since filing not faxing, was the mandatory prerequisite and requirement placed upon Gomez under the Court's orders regarding his acceptance of remittitur. Gomez' repeated efforts to reinterpret the facts and to go outside and supplement the record with incorrect statements, misrepresentations and false impressions in this regard should be recognized for what they are. Yet, Gomez remains undaunted in his argument despite the fact that the Acceptance of Remittitur was filed too late and that the record in this case points out that the Court's Order of May 15, 2001 and Amended Order of May 24, 2001 required that acceptance of remittitur be filed. There is nothing in this Court's record on appeal or otherwise indicating that Judge Wells "accepted" Gomez' faxed Acceptance of Remittitur. Under the Local Rules of Jackson County, Missouri filing by facsimile transmission is not authorized nor was facsimile filing authorized by

> Judge Wells' orders. Simply stated, the facsimile transmission by Gomez of his Acceptance of Remittitur could not have been "accepted" by either Judge Wells or his clerk and was null and void *ab initio*. In fact, under the Local Circuit Court Rules of Jackson County, the faxed filing of this type of pleading is prohibited and cannot be "accepted" for filing. It is clear from the Court's orders that filing was specifically mandated and Gomez was required to file a written Acceptance of Remittitur no later than 4:30 p.m., Friday, May 25, 2001. Gomez' Acceptance of Remittitur was not filed until May 31, 2001. It remains a fact without any doubt that the record before this Court shows that Gomez' written Acceptance of Remittitur was filed too late and that a new trial was required to be ordered in this case.

Consistent with its approach with respect to the reply to Gomez' statement of facts, CDI will address other factual and legal shortcomings in its Response to Respondent's Cross-Appellant Appeal and Reply Brief where appropriate.

RESPONSE TO RESPONDENT CROSS-APPELLANT'S APPEAL

I. IN GRANTING REMITTITUR THE TRIAL COURT IMPLICITLY FOUND THAT THE JURY'S VERDICT WAS EXCESSIVE AND ITS JUDGMENT, EVEN AS REMITTED, IS STILL SO GROSSLY EXCESSIVE BY ANY STANDARD AS TO CONSTITUTE AN ARBITRARY ABUSE OF DISCRETION AND SHOCK THE CONSCIENCE OF THIS COURT.

A.
STANDARD OF REVIEW

The appellate court will interfere with an order of remittitur only upon a finding that both the jury's verdict and trial court's ruling constituted an arbitrary abuse of discretion, and the trial court will be deemed to have abused its discretion where the remitted judgment is still so excessive as to shock the conscience of the appellate court. ***Barnett v. La Societe Anonyme Turbomeca***, 963 S.W.2d 639 (Mo.App. W.D. 1997). Entitlement to a new trial based on the excessiveness of the verdict requires a showing of trial court error. ***Callahan v. Cardinal Glennon Hosp.*** 863 S.W.2d 852 (Mo. banc 1993); ***Larabee v. Washington***, 793 S.W.2d 357 (Mo. App. W.D. 1990).

B.
ARGUMENT

Gomez, in an effort to retain the jury's verdict of $3,760,000, contends that the trial court erred in granting remittitur because the verdict was neither grossly excessive nor demonstrated bias, passion and prejudice and that this verdict was reasonable compensation for his injuries. By so doing, he effectively concedes what the trial court recognized as obviously being a verdict so grossly excessive that it demonstrated bias, passion and prejudice on the part of the jury. Unfortunately, by any standard, even the remitted judgment as well was an abuse of discretion that also shocks the conscience of this Court.

Gomez does not cite a single Missouri case approving a compensatory damage award based upon similar facts and evidence that even remotely approaches the size of the jury verdict here. Instead, Gomez maintains that the jury verdict represents fair and reasonable compensation for his injuries in that the resulting compensatory award is supported by the evidence and is in relation to the damages proven at trial. This claim ignores and disregards the fact that the jury verdict is simply disproportionate as to the proof of injuries and damages and because of trial court error so unwarranted as to establish bias, passion and prejudice on the part of the jury.

In its substitute brief, CDI stated that under ***Larabee v. Washington***, 793 S.W.2d 357 (Mo. App. W.D. 1990), review of the compensatory damage award in this case for excessiveness requires that this Court consider the evidence and verdict in this case in light of, among other things, Gomez' age, loss of income, present and future medical expenses, nature and extent of injuries and economic factors. Gomez would have this Court judge the

excessiveness of the verdict on contradictory evidence as to his injuries and almost a complete absence of evidence as to his economic damages and loss. Gomez offers no suitable comparison awards and ignores the tenets of ***Larabee***. Accordingly, recognizing that there is no exact formula for determining whether an award of compensatory damages is excessive, each case must be considered on its own set of facts. ***Callahan v. Cardinal Glennon Hosp.***, 863 S.W.2d 852 (Mo. banc 1993).

It is submitted that at trial and under the set of facts of this case there was no substantial evidence of Gomez' life expectancy, lost earnings (past, future or present value thereof) or any testimony of past or future medical expenses from his treating doctors and health care providers (or their reasonableness and necessity) to support either the verdict returned or the Court's subsequent remittitur. Under Section 537.068, a remittitur is designed to rectify a verdict that exceeds fair and reasonable compensation for a plaintiff's injuries and damages based upon the evidence presented at trial. Accordingly, the issue presented here is whether the Court's remittitur cured the problem that obviously plagued the jury's verdict. It is obvious from a review of the transcript of this appeal that the verdict was excessive, without support in the record and the product of bias, passion and prejudice requiring remittitur. However, even as remitted, under the facts of this case, the judgment of the trial court still did not and cannot correct the erroneous and prejudicial verdict and grossly excessive judgment based upon the evidence and facts at the trial of this case.

Gomez has not cited a single reference in the record or transcript that even remotely approaches support for the size of the verdict or remittitur in this case. Instead, he continues to maintain that evidence of multiple substantial injuries and damages attributable to the negligence of CDI was presented at trial. Characteristically, there are no transcript references or support in the record that would allow this argument to stand. Notably absent from Gomez' argument is the fact that the evidence was clearly disputed with respect to the nature, extent and permanency of his injuries, pain and suffering, and the medical expenses and economic loss attributable to these injuries. (Dr. Charles Donohoe, Defendant's Exhibit 102; Mitchel Woltersdorf, Ph.D., Defendant's Exhibit 100; Dr. Dennis Cowan, Tr. 365-419; Dr. Bernard Abrams, Plaintiff's Exhibit 56; Dr. Richard Kuhns, Plaintiff Exhibit 59; Dr. Fernando Egea, Plaintiff's Exhibit 60 and Dr. David Mouille, Tr. 115-205). Since there was no such evidence presented, Gomez' counsel could not and did not request a verdict amount from the jury in her closing argument. Viewed in a light most favorable to Gomez, it is impossible to make any determination from the facts and record in this case as to how the jury arrived at such an undeniably excessive verdict. Accordingly, under these circumstances, it is obvious that even the remitted judgment of the trial court was incapable of correcting an erroneous and prejudicial jury verdict based upon the evidence presented in the case and, even as remitted, the judgment is still so excessive as to shock the conscience of this Court.

Gomez would have the Supreme Court of Missouri judge the excessiveness of the damages awarded by the jury below by doing the same thing the jury and trial court did in this

case; i.e., engage in conjecture and speculation as to both causation and damages. Even given the discretion afforded juries to assess damages and trial courts to exercise their power of remittitur, a personal injury award over 20 times greater than any amount that could be inferred from the evidence as economic and non-economic loss and a remitted judgment over 16 times greater than any inferred loss most certainly should "shock the conscience" of this Court so to warrant a new trial or further remittitur in this case. If our appellate courts do not apply the brakes to instill some modicum of rationality in personal injury verdicts spun out of control by trial courts that improperly submit cases to juries without sufficient proof of causation and damages leaving the jury to find and assess damages based upon speculation and conjecture, the adverse consequences recently predicted by the Second Circuit will surely come to pass: "One excessive verdict, permitted to stand, becomes precedent for another still larger one." ***Consorti v. Armstrong World Industries, Inc.***, 72 F.3d 1003 (2d Cir. 1995), vacated 116 S.Ct. 1589 (1996).

The jury's action in this case, compounded by the trial court's abuse of discretion when it remitted the judgment, are explainable only as a product of bias, passion and prejudice. Although bias, passion and prejudice are usually difficult to trace, there is no such mystery in this case. For whatever reason, and certainly not based upon any evidence or proof of damages, something ignited the fires of passion and prejudice and produced a verdict that is unexplainable in any other terms. Clearly, a new trial is required by this mammoth and unsupportable verdict that can be attributable only to the poison injected in the case by the trial

court's erroneous admission into evidence of a post-accident videotape of the accident scene depicting a bright yellow **"CAUTION"** tape surrounding the area where Gomez fell which, together with evidence of disputed injuries, unsupported proof of damages and instructional plain error prejudicially and erroneously implied or assumed fault on the part of CDI in failing to warn Gomez of a potentially dangerous condition and resulting damages to him. Where, as here, evidence is improperly admitted, thus resulting in an erroneous verdict, such verdict cannot be corrected by remittitur. ***Coleman v. Ziegler***, 226 S.W.2d 388, 393 (Mo. App. St.L. App. 1950).

Alternatively, even if a new trial is not ordered here, this Court should enter at least an even more substantial remittitur to eliminate the excessiveness of this judgment and to bring it in line with the evidence and proof of damages presented at trial. Whatever yard stick is used, the award of $2,760,000 for compensatory damages in this case is miles beyond anything that could arguably be called reasonable under the evidence presented in this case. CDI submits that in this case this Court can interfere with the trial court's Order of Remittitur and enter a new trial order by finding that both the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion. The trial court will be deemed to have abused its discretion when the remitted judgment is still so excessive as to shock the conscience of the Court. ***Barnett v. La Societe Anonyme Turbomeca***, 963 S.W.2d 639 (Mo.App. W.D. 1997). The trial court's remittitur order was but a small step in an effort to cure what it correctly perceived as an obvious gross inequity. Recognizing that the trial court has broad discretion

in ordering remittitur because the ruling is based upon the weight of the evidence, it is clear from the record before us that Gomez failed to meet his burden of proof, that this was not a submissible case at all and that the judgment, even as remitted, should shock even the most stoic conscience.

Accordingly, given the factors recited above, even the remitted judgment in this case cannot correct the erroneous and prejudicial verdict based upon the evidence in this case. This result leads to no other conclusion but that the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion so as to shock the conscience of this Court and require a new trial. Alternatively, even if a new trial is not ordered here, this Court, at the very least, must enter a more substantial remittitur to eliminate the excessiveness of this judgment and to bring it in line with the evidence presented at trial.

II. PLAINTIFF'S CLAIM RAISED FOR THE FIRST TIME ON APPEAL OF TRIAL COURT ERROR IN GRANTING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE DEFENDANT COMMITTED FRAUD AND DECEIVED PLAINTIFF IN THE TRIAL COURT BY DISCLOSING ADDITIONAL INSURANCE COVERAGE IN SUPPLEMENTAL INTERROGATORY ANSWERS FILED AFTER THE JUDGMENT IS FALSE AND CANNOT BE CONSIDERED BY THE MISSOURI SUPREME COURT BECAUSE:

(1) THIS CLAIM WAS NEITHER PLEADED NOR PRESENTED TO THE TRIAL COURT IN ANY WAY; AND

(2) NO EVIDENCE WAS PRESENTED TO OR PROPERLY PLACED BEFORE THE TRIAL COURT ON THIS ISSUE;

THEREFORE, THERE IS NOTHING IN THE RECORD ON THIS ISSUE THAT HAS BEEN PRESERVED FOR APPELLATE REVIEW.

A.
STANDARD OF REVIEW

The standard of review of this Court is that it will not consider matters *dehors* the record. ***Browning-Ferris Industries of Kansas City, Inc. v. Dance***, 671 S.W.2d 801 (Mo.App. W.D. 1984). This includes documents, exhibits or other evidence that were never presented to nor considered by the trial court ***Castle v. Castle***, 642 S.W.2d 709, 711 (Mo.

App. W.D. 1982); ***Grant v. Estate of McReynolds***, 779 S.W.2d 246 (Mo.App. E.D. 1989). Factual assertions in the brief cannot supplement the transcript. ***McCormick v. St. Louis University, Inc.***, 14 S.W.3d 601 (Mo.App. E.D. 1999). Appellate review of a trial court's judgment is limited to evidence that was properly before the trial court. ***Estate of Russell***, 932 W.S.2d 822, 827 (Mo.App. S.D. 1996). In this regard, appellate courts cannot accept counsel's statements as a substitute for the record itself in statements and briefs, when unsupported by the record, and not conceded by a party's adversary, which are not evidence and, as such, insufficient to supply essential matters for review. ***McDonald v. Thompson***, 35 S.W.3d 906 (Mo.App. S.D. 2001). Likewise, Missouri appellate courts must disregard any reference to such documents in Gomez' substitute brief to the extent that they are not before the trial court in this matter. ***Lay v. St. Louis Helicopter Airways, Inc.***, 869 S.W.2d 173 (Mo.App. E.D. 1973). An issue that was never presented to or decided by the trial court is not preserved for appellate review. ***State ex rel Nixon v. American Tobacco Company,*** 34 S.W.3d 122 (Mo banc 2000).

B.
ARGUMENT

Gomez would have this Court judge the excessiveness of the damages awarded by the jury and later remitted by the trial court by falsely claiming that CDI committed fraud and deceived the trial court by not disclosing the entire extent of its insurance coverage until after judgment was entered in this case. This argument lacks any merit and is meant only to

prejudice CDI in its arguments as to the prejudicial error committed by the trial court and the defects in Gomez' case requiring that a new trial be granted in this matter.

It is obvious that this duplicitous argument has only been advanced by Gomez in order to place before this Court the extent of CDI's insurance coverage when considering its request for a reversal or new trial of this case. This deplorable and outrageous attempt on the part of Gomez to further prejudice CDI on its appeal by injecting the amount of its insurance coverage into this Court's deliberations of this appeal must be disregarded and rejected.

First, apart from the fact that the record does not support these blatantly false statements, Gomez' argument is improperly based upon information and pleadings never presented to or decided by the trial court in any way and, therefore, may not be introduced into the record for the first time on appeal ***Marc's Restaurant Inc. v. CBS, Inc.***, 730 S.W.2d 582, 584 (Mo.App. E.D. 1987). Likewise, this Court must disregard any reference to documents in Gomez' brief to the extent that they were not before the trial court in this matter. ***Lay v. St. Louis Helicopter Airways, Inc.***, 869 S.W.2d 173 (Mo. App. E.D. 1973). Additionally, since the argument is based on documents not in the record, the entire argument should be rejected and stricken from Gomez' substitute brief.[2]

[2]A Motion to Strike Portions of Respondent Cross-Appellant's Substitute Brief and Appendix with supporting Suggestions have been filed by CDI and are currently before this Court for consideration.

Second, Gomez inappropriately and unprofessionally suggests that CDI's supplementation of its discovery responses was the product of fraud and deceit that should prevent the granting of a new trial or any further remittitur in this case. This argument is outrageous, contravenes all logic and is not worthy of any response. CDI categorically denies that it has committed any fraud or deceived Gomez and the Court in any way whatsoever with regard to the supplemental interrogatory responses concerning its insurance coverage. Gomez and his counsel were well aware both before and after trial, based upon settlement discussions, that their settlement demand and the remitted judgment were within the limitations of CDI's insurance coverage.[2]

The liberties taken by Gomez with regard to this argument and raising this issue for the first time on appeal are an egregious distortion of the facts and obviously an improper attempt to place before this Court the limits of insurance coverage available in this case and to satisfy any judgment and inadmissible written communications between the parties of settlement negotiations. This highly improper tactic and scheme are meant only to further prejudice CDI in its attempt to obtain a new trial of this case. This court cannot accept these false and misleading recitals and statements as a substitute for the record in its review of the trial court's judgment. ***McDonald v. Thompson***, 35 S.W.3d 906, 909 (Mo.App. S.D. 2001). The

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[2]All offers of settlement made by CDI to Gomez both before and after trial were within its coverage limits and every offer was rejected by Gomez. Accordingly, any claim by Gomez of fraud and deception on the part of CDI is reprehensibly false.

documents referenced in Gomez' argument and the mischaracterization of events described in his substituted brief and included in the appendix of his substitute brief were not part of the trial court record in this case. It is well known that neither evidence regarding settlement discussions nor these discovery responses nor letters regarding settlement were ever introduced or made a part of the Court's record in this case. Indeed, because the law favors settlements, evidence regarding settlement negotiations are excluded because such efforts should be encouraged and the party making an offer of settlement should not be penalized by revealing the offer if the negotiations fail to materialize. ***Stan Cushing Const. v. Cablephone, Inc.***, 816 S.W.2d 293, 295 (Mo. App. S.D. 1991), citing ***Owen v. Owen***, 642 S.W.2d 410, 414 (Mo. App. S.D. 1982). Contrary to Gomez' protestations, there has been no prejudice to him. Gomez' settlement demands before trial were always within the coverage originally reported and after the remitted judgment within the policy limits identified in CDI's supplemental interrogatory answers. Gomez has never made any settlement demands after the remitted judgment. Obviously, this blatantly false issue has nothing to do with this appeal and should be stricken. Any future concern of Gomez on this issue could have easily been taken up with the trial court both prior to and during this appeal. See Rules 61.01, 74.06 and 75.01, Mo.R.Civ.P. Perhaps the more telling portion of Gomez' argument and the misstatements and prejudice it intends to promote before this Court is his tacit admission that he suffered no harm or prejudice since all settlement offers of CDI were rejected by him.

In summary, the argument and assertions contained in Gomez' substitute brief on this point strain credulity to intolerable limits and far exceed the boundaries of acceptable professional conduct. Accordingly, under these circumstances Gomez' argument must be disregarded as fundamentally and legally improper and as an unashamed misstatement and distortion of the record that must be stricken from his substitute brief.

REPLY BRIEF

I. IT WAS OBVIOUS ERROR AFFECTING THE CIVIL DUE PROCESS RIGHTS OF CDI FOR THE TRIAL COURT TO SUBMIT A *RES IPSA LOQUITUR* INSTRUCTION WHICH RESULTED IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE TO CDI CONSTITUTING PLAIN ERROR BECAUSE GOMEZ' PLEADINGS, EVIDENCE AND CLOSING ARGUMENT CLEARLY DEMONSTRATED THAT HIS CASE WAS PLED AND TRIED SOLELY ON A THEORY OF SPECIFIC NEGLIGENCE AND IN INSTRUCTING THE JURY UNDER THE DOCTRINE OF *RES IPSA LOQUITUR* THE TRIAL COURT RELIEVED GOMEZ OF HIS DUTY OF PROVING THE REQUISITE AND ESSENTIAL PROOF ELEMENTS OF HIS CASE, WHICH WAS IN SERIOUS DISPUTE AT TRIAL, SPECIFICALLY ON THE ISSUE OF WHETHER THE ALLEGED ACTS OR OMISSION OF CDI WERE NEGLIGENT.

ARGUMENT

A. Rule 84.13(c) Provides That This Court May Consider Plain Error Affecting Substantial Rights On Appeal When The Court Finds That Manifest Injustice Or A Miscarriage Of Justice Has Resulted Therefrom.

Gomez' view of the plain error rule is skewed and his argument on this point strains credibility to intolerable limits for him to argue that this issue was never raised at any time prior to the Appellate Court's decision.

Gomez' claim in his substitute brief that CDI never raised any objection to Interrogatory No. 7 "at any point in the trial or appeal process prior to Defendant's Substitute Brief" is blatantly false. Gomez implies that the Court of Appeals' decision upon which this transfer was granted raised plain error on its own. While Gomez is correct that CDI did not object to Instruction No. 7 at trial, these statements are deserving of sanctions. CDI's claim of plain error was raised in its Amended Brief (Point V) filed with the Court of Appeals, Western District, and was the confirmed basis of that Court's opinion reversing and remanding this case for a new trial.

Appellate courts have considered arguments regarding instructions under the plain error rule even after the amendment of Rule 70.03 ***Jungerman v. City of Raytown,*** 925 S.W.2d 202, 207 (Mo. banc 1996). Moreover, plain error may be raised by a party or raised by the appellate court *sua sponte* or *ex gratia*. Suggesting that a finding by this Court of plain error in giving Instruction No. 7 would be unfairly generous to CDI and that it would allow CDI to reap a substantial windfall ignores Missouri law as to the purpose of the plain error rule. It's hard to imagine that an instructional error that failed to instruct the jury in this case on the requisite elements of Gomez' claims of specific negligence (or even *res ipsa loquitur*) and, specifically on the issue of whether CDI's alleged acts or omissions were negligent, would not

"affect the substantial rights" of CDI and produce manifest injustice or a miscarriage of justice.

B. Instruction No. 7 Did Not Instruct The Jury On The Requisite Elements Of Gomez' Claim.

Gomez attempts to justify the use of Instruction No. 7 by claiming that what he proved at trial was "an unusual event which could have been caused by any number of negligent acts by CDI but the specific cause is unknown." This argument is simply erroneous and unsubstantiated by the record. This is not a case where Gomez could not know which of the possible acts actually caused his injury. It is curious to note that in his substitute brief, Gomez is also arguing in the face of his interpretation of the proof that he proved the following facts at trial: (1) CDI lifted up the heat exchanger and caused the hole in which Gomez fell; (2) CDI's employees knocked loose the grating; (3) CDI employees stated they should have checked the grating to determine whether it was fastened; and (4) CDI should have shouted a warning to the other workers in the area of this condition. All of these claims were specifically pled in his petition. Meanwhile, at the same time, Gomez argues to this Court that he could not know which of the possible acts actually caused his injuries.

Gomez' substitute brief in this regard misses the point and this argument belies the record since he presented evidence of specific and multiple causes of negligence. Indeed, there was nothing presented by the evidence to suggest that this was an "unusual occurrence." Moreover, contrary to his argument, having submitted proof of precise and specific negligent

causes (as well as the fact that the injury resulting was not unusual), Gomez' reliance on ***Redfield v. Beverly Health and Rehabilitation Service, Inc.***, 42 S.W.3d 703 (Mo.App. E.D. 2001) and ***Calvin v. Jewish Hospital of St. Louis,*** 746 S.W.2d 602 (Mo.App. E.D. 1998) as support for his position is particularly lame. Having presented evidence of specific multiple causes, the trial court was bound by the pronouncements of this Court in ***City of Kennett v. Akers,*** 564 S.W.2d 41, 48-49 (Mo. banc 1978) and, having proved the real and precise causes of his injuries, he could not submit under *re ipsa loquitur*. See also ***Guffey v. Integrated Health Services,*** 1 S.W.3d 509, 514 (Mo.App. 1999).

There is also no logic to Gomez' argument on this issue. Despite admitting that he presented specific and certain alleged acts of negligence that caused his injury, giving a literal translation to this point would mean that in every case where there is proof of a combination of precise and specific negligent causes involved for an injury, whether standing alone or together, that a *res ipsa loquitur* instruction would be proper because "the occurrence could have been caused by any one of several different acts of specific negligence." This interpretation is nonsense and contrary to Missouri law. Had Gomez pled general negligence he could have submitted evidence of specific negligence, and still have been allowed to submit on a *res ipsa loquitur* theory unless his evidence showed the precise and specific negligent causes. ***City of Kennett v. Akers***, 564 S.W.2d at 46. This did not occur in the instant case. Gomez maintained at trial that CDI was specifically negligent by moving the grate and causing a hole through which he fell and by failing to warn of the condition or check to see whether the

grate was fastened. Gomez' counsel's closing argument again pointed to these specific omissions by CDI which she urged constituted negligence. Accordingly, there is a difference here because Gomez did show the precise and specific cause of the alleged negligence that led to his injury and argued them to the jury, thus, precluding his proceeding on a *res ipsa loquitur* theory.

For the doctrine of *res ipsa loquitur* to apply Gomez had to show (1) the incident causing the injury is of a kind that does not ordinarily occur in the absence of negligence; (2) the instrumentality causing the injury is under the control of the defendant; and (3) the defendant has superior knowledge as to the cause of the injury. ***Guffey v. Integrated Health Services,*** 1 S.W2d at 514. The doctrine aids an injured party who is uncertain as to the exact cause of his or her injury. ***Weaks v. Rupp***, 966 S.W.2d 387, 394 (Mo.App.W.D. 1998) "[T]he doctrine relieves a plaintiff of proving specific negligence and creates a rebuttable inference of general negligence which gets the plaintiff to the jury where the defendant may rebut the inference." ***Graham v. Thompson***, 854 S.W.2d 797, 799 (Mo.App. W.D. 1993).

Gomez could not submit under *res ipsa loquitur* if he either: (1) pled specific negligence only; or (2) pled general negligence (*res ipsa loquitur*) only, or in the alternative to specific negligence, and prove the real and precise cause of the injury. ***City of Kennett v. Akers***, 564 S.W.2d at 48-49. Conveniently, Gomez ignores in his substitute brief his failure to pled *res ipsa loquitur* in his petition and suggests, without any supporting authority, that this is just a "technical rule" that would serve no practical purpose and would be "elevating form

over substance." The failure of the trial court to follow this so-called "technical rule" constituted plain error under Missouri law when it submitted Gomez' case on the unpleaded theory of *res ipsa loquitur*. ***Bond v. Cal. Comp. & Fire Co.,*** 963 S.W.2d 692, 698-99 (Mo.App. W.D. 1998). Accordingly, this argument by Gomez runs counter to Missouri law and should be rejected.

Gomez' suggestion that Instruction No. 7 "adequately stated" the law must also be analyzed. Equally obvious was the manifest injustice resulting to CDI by the submission of Instruction No. 7 which did not state the law and the jury was never asked to deliberate on whether CDI's acts of negligence, were in fact, negligent. This instruction assumed negligence and asked the jury to determine whether this assumed negligence was a direct and proximate cause of Gomez' alleged injuries and damages. This is not the law in Missouri. A plaintiff's verdict directing instruction must require the jury to find all elements necessary to the plaintiff's case, except those unmistakably conceded by both parties. ***Karnes v. Ray,*** 809 S.W.2d 738, 741 (Mo.App. S.D. 1991). Omitting an essential element of its case, i.e., that the alleged acts or omissions of CDI were negligent, together with his failure to instruct as to the control of the floor grating area, goes to the very heart and essence of Gomez' actions against CDI: Was CDI negligent and, therefore, liable to Gomez in damages for his injuries. Gomez' substitute brief offers no legal support for his position in this regard and thus evaporates.

At best, Instruction No. 7 submitted that the jury could find against defendant merely because it may have dislodged the floor grating. This alone would not support liability

to the plaintiff and clearly amounted to a "roving commission" when it failed to advise the jury, or point out in any way, what acts or omissions on the part of the defendant, if any, found by them from the evidence, would constitute liability. ***Centerre Bank of Kansas City v. Angle***, 976 S.W.2d 608 (Mo.App. W.D. 1998). Additionally, Instruction No. 7 is also a roving commission because it is too general and is submitted in a broad and abstract way without any limitation to the facts and the law developed in the case. ***Lashmet v. McQueary***, 954 S.W.2d 546, 550 (Mo.App. S.D. 1997). Jurors must be informed of what conduct they are permitted to consider in order to hold the defendant liable and it is not permissible for the jury to roam through the evidence and choose any facts which suit its decision. ***Centerre Bank***, 976 S.W.2d at 618; ***Duncan v. First State Bank of Joplin***, 848 S.W.2d 566 (Mo.App. S.D. 1993). Clearly this instruction was erroneous and, although not objected to, obviously falls within the relief warranted under Rule 84.13(c) requiring a new trial in this case.

The trial court's obvious failure to instruct the jury on the requisite proof elements of either Gomez' pleaded claims of specific negligence or, alternatively, on his unpleaded but submitted instruction of *res ipsa loquitur*, relieved Gomez of proving essential elements of his claim that were in serious dispute at trial, which due process required him to prove. The trial court's clear and obvious error in submitting a *res ipsa loquitur* verdict directing instruction when Gomez' pleading, evidence and closing arguments clearly demonstrated that the case was pled and tried solely on a theory of specific negligence requires a reversal and new trial. ***Balke v. Century Missouri Elec. Co-op,*** 966 S.W.2d 15, 26-27 (Mo.App. 1997).

The trial court compounded this error when it submitted Instruction No. 7 which relieved Gomez of the due process requirement of proving each element of his cause of action by a preponderance of the evidence, which constituted manifest injustice and plain error. ***State v. Crenshaw***, 59 S.W.3d 45, 49 (Mo.App. E.D. 2001); ***Haynam v. Laclede Electric Co-op,*** 827 S.W.2d 200, 204 (Mo. banc 1992). Accordingly, for these very cogent reasons, because of obvious error in the verdict directing instruction resulting in a manifest injustice, substantial grounds exist here requiring a remand of this case for a new trial.

II. THE TRIAL COURT ERRONEOUSLY ENTERED ITS ORDER AND AMENDED JUDGMENT ON MAY 31, 2001, AND THIS COURT'S JURISDICTION IS LIMITED TO DISMISSING AND REMANDING THIS CASE FOR A NEW TRIAL BECAUSE:

(1) PLAINTIFF'S FAXED FILING OF HIS ACCEPTANCE OF THE PROPOSED REMITTITUR WAS VOID; AND

(2) THE TRIAL COURT'S MAY 24, 2001 ORDER CONDITIONALLY GRANTING DEFENDANT A NEW TRIAL BECAME THE FINAL JUDGMENT OF THE COURT DEPRIVING THIS COURT OF ANY JURISDICTION

ARGUMENT

A. Gomez' Argument That Rule 43.02 Was Never Intended To Apply To Filings Not Required By The Missouri Rules Of Civil Procedure Fails To Consider Either Rule 78.10, Which Provides For Remittitur And Consent To Remittitur Or Rule 41.04, The Rule Which Provides For Those Procedures Where None Are Specially Provided By Specific Rule.

Gomez does not dispute the fact that the Local Circuit Court Rules of Jackson County do not expressly authorize by fax the filing of his acceptance of remittitur, but contends that the law does not prescribe a mandatory method of acceptance of a proposed remittitur such

that it was within the discretion of the trial court to determine the validity of his acceptance of the proposed remittitur in this case. Gomez' attempt to interpret Rule 43.02 in order to resolve this issue ignores the undisputed fact that Judge Wells' order prescribed the mandatory method he required of Gomez for acceptance of the proposed remittitur.

While Rule 43.02(c) does not expressly prohibit the fax filing of "motions, applications, orders, warrants, pleadings and the like" not authorized by local circuit court rule, a better argument can be made for such an interpretation in that why else would the Supreme Court see fit to expressly provide in the rule for the authorization of such filings by local circuit court rule if it did not intend to prohibit other such filings by fax not so authorized. Simply stated, giving the language of this rule its plain and ordinary meaning, it is clear that it must be read as prohibiting the fax filing of any pleading with the Court which is not expressly authorized by the Local Circuit Court Rules of Jackson County.

Whether the law requires such a mandatory method makes no difference here since Judge Wells' order provided the ground rules to Gomez for avoiding a reversal of the jury verdict and new trial of his case. In other words, this Court intended that all filings "with the court" as required by Rules 41 through 101 were to be accomplished by physically filing the pleading with the clerk or judge, except that such filings could also be done by facsimile transmission *if permitted by local circuit court rule*. A result oriented interpretation of Rule 43.02 by Gomez ignores the simple fact that it was mandated by Judge Wells that he file not fax his acceptance. Attempting to argue that somehow Rule 43.02(c) was never intended to

apply to filings not required by the Rules of Civil Procedure further ignores, as noted below, Rules 41.04 and 78.10.

Gomez' reliance on Rule 43.02(b) for the proposition that when read together with Rule 43.02(c) makes (c) an exception to (b) misses the point. This argument is without logic or any legal basis. Rule 78.10 specifically sets forth the procedure for remittitur and is clearly a "required filing" under Rules 41 through 101. Moreover, Rule 41.04 makes provisions for procedures to be followed when no procedure is specially provided by rule. Accordingly, claims by Gomez that the provisions of Rule 43.02(b) do not apply to the acceptance of remittitur and that the trial court was free to dictate the manner of Gomez' acceptance, including filing by fax, conveniently ignores Missouri Rule 78.10. Since Rule 43.02 distinguishes between "filing" and "fax filing" and the Local Rules of the Circuit Court of Jackson County, Missouri did not allow for the fax filing of Gomez' acceptance of remittitur, Judge Wells specifically set forth the procedure for "filing" of this acceptance which was consistent with both the Missouri Rules of Civil Procedure and the Local Rules of the Circuit Court of Jackson County, Missouri. In this regard, see also Rule 43.02 defining "filing," Rule 43.02(c) which discusses facsimile filing procedure, the Local Rules of the Circuit Court of Jackson County, Missouri which only authorizes the filing by facsimile transmission of petitions and other necessary pleadings in adult abuse and child protection cases, applications for continuances and in certain probate matters (Rules 4.8, 34.4 and 72.3, respectively, app. A25 p. 30), and Rule 41.04.

Hence, even if Judge Wells had, as Gomez suggests, the freedom to dictate the manner of his acceptance, including fax filing (which is not an issue for this Court's determination), then he must certainly dictated the manner in this case, i.e., "Plaintiff shall have up to and including 4:30 p.m. on Friday, May 25, 2001 to file a written acceptance of the remitted amount"(L.F. 050-51). Accordingly, for these reasons, Gomez' faxed acceptance of remittitur was neither proper nor timely, the trial court's Order of May 24, 2001 became a final judgment and the jurisdiction of the Missouri Supreme Court is now limited to dismissing and remanded this case for a new trial.

B. Gomez' Faxed Filing Of The Acceptance Of Remittitur Was Without Legal Effect Such That The Trial Court's May 24, 2001 Order Granting CDI A New Trial Conditioned On Gomez Not Accepting, In Writing, The Court's Remittitur By 4:30 p.m. May 25, 2001 Became By Default The Final Judgment Of The Trial Court Which It Was Powerless To Amend And From Which No Timely Appeal Was Filed, Thereby Depriving This Court Of Any Jurisdiction, Except To Dismiss And Remand For A New Trial.

There is no support for the claim and Gomez is incorrect when he states that he accepted remittitur of the judgment in a form and within a time period acceptable to the trial judge. The trial court's May 15, 2001 Order (LF 48-49), which was later corrected by its Amended Order of May 24, 2001 (LF 50-51, required Gomez to file his written acceptance of remittitur by 4:30 p.m. May 24, 2001, otherwise a new trial would be ordered. There was

no provision in either of these orders for plaintiff's oral or faxed acceptance. Only a timely filed written acceptance would prevent the granting of a new trial on all issues in this case.

Gomez claims that his failure to file the written acceptance of remittitur in a timely fashion was acceptance nonetheless because there was no statutory deadline and the court could set any time frame or deadline it desired. This argument defies logic and ignores the fact that, among other things, the date that the judgment becomes final and appealable is dependent upon whether or not plaintiff's written acceptance of remittitur is timely filed. ***Wicker v. Knox Glass Associates,*** 242 S.W.2d 566, 568 (Mo 1951); ***Cotter v. Miller,*** 54 S.W.3d 691 (Mo.App. W.D. 2001). Since Gomez failed to properly file his written acceptance on May 25, 2001, the Court's May 31, 2001 Amended Order was void, thereby depriving this Court of any jurisdiction of this appeal. Accordingly, a new trial on all issues is required here.

Without the benefit of any record or citations, Gomez next tries to rationalize his error. Despite Gomez' lengthy discussion of what the trial court "indicated" or "clearly contemplated" by its orders and reported conversations and discussions with the court and counsel, there is nothing in the record that supports these claims. There is also nothing in the record validating Gomez' assertions that the "trial court approved the timeliness and manner of Gomez' acceptance" or that "Gomez indicated satisfaction and acceptance in a manner which was acceptable to the Trial Court." There is also thing in the record to support Gomez' assertions of any conversation by the parties and the Court concerning the Court's incorrect date notation in its original Order. Once again, Gomez has taken liberties with the facts and

evidence that is missing in the record. Perhaps, the most notorious assertion is the claim that "Gomez indicated" that he would "... fax to the Court and Construction Design Inc. his acceptance or rejection on the 25th" and that "on May 25, 2001, Friday before the Memorial Day weekend, counsel for Gomez notified the Court and counsel for Construction Design Inc. orally that Gomez would accept the remitted amount and be satisfied" (Sub. Br. 42). Gomez' repeated efforts to reinterpret the record in this regard should be recognized for what they are.

Counsel for CDI is not aware of any conversations between the court and Gomez' counsel of the nature or substance suggested in Gomez' substitute brief and they were never notified orally by counsel for Gomez that the remittitur would be accepted. Neither CDI nor its counsel are aware of or were privy to any similar conversations with the Court. Gomez' continuing effort to supplement the record by unsupported allegations and erroneous interpretations of events prior to this appeal are improper. It has long been recognized by our appellate courts that factual assertions in a brief cannot supplement the transcript and are insufficient to supply essential matters for review. ***Coulter v. Michelin Tire Corp.,*** 622 S.W.2d 421 (Mo.App. 1981); ***Flora v. Flora***, 834 S.W.2d 822, 823 (Mo.App. E.D. 1992).

Gomez also outdoes himself by further arguing that even if a written notice of acceptance of remittitur was required to have been filed, the trial court's course of dealings in the litigation authorized his faxed filing in this case. In reviewing the record and Legal File in this case, it is clear that the only faxed pleading was the Court's Amended Order of May 17, 2001 correcting "Thursday" to "Friday" in its Order of May 15, 2001. This was also the only

post-trial order faxed by the trial court to the parties and the only faxed pleading in the record before this Court. The prerequisites for facsimile filings of pleadings by the parties under the Local Rules of the Jackson County Circuit Court have previously been addressed by CDI in its substitute brief. Suffice to say, the Local Rules of the Circuit Court of Jackson County, Missouri do not permit and the Circuit Court could not have accepted for filing and did not accept for filing the facsimile transmission of Gomez' written Acceptance of Remittitur pleading on this or any other basis.

Gomez' statement as to fax filing by the court is also erroneous for an additional reason. Rule 43.01(g) provides as follows:

> **(g) Service of Orders, Judgments and Other Documents.** Any order, judgment or other document issued by the court may be transmitted to the attorney or party as authorized in Rule 43.01(c), provided service pursuant to Rule 54 is not required. Such documents may be transmitted to non-parties in the same manner as is authorized for service upon an attorney.

Thus, Rule 43.01(c) permits facsimile service upon counsel and parties by the trial court but not facsimile filing. Rule 54 relates to service of summons and is not applicable to the instant case. Without belaboring the point, once again, Gomez' argument is not applicable to the facts and record in this case.

Gomez' argument that if he made any mistake it was "trivial" and that it resulted in no prejudice to CDI is illogical and self-refuting. The prejudice to CDI is obvious. Instead of a

new trial being granted as required by the court's amended order, CDI is left with a remitted judgment that was improperly and incorrectly entered and void and with having to pursue an appeal where there is no appellate jurisdiction. The date a judgment becomes final and appealable is dependent upon whether or not remittitur is accepted. This is hardly a "trivial" matter. Judge Wells' Amended Order states "if a written acceptance is so filed (L.F. 51)." Accordingly, Gomez' attempt to equate or compare his failure to timely file a written acceptance of remittitur with examples of cases discussing the misnumbering of paragraphs in a judgment order, a clerk's failure to serve a notice of dismissal for failure to prosecute, and the allowance of a court to fix a defect in service of process ignores the legal significance and importance of filing a written acceptance of remittitur and the procedural time requirements set forth and placed upon Gomez by the Court's Amended Order of May 17, 2001. Gomez was given a clear choice by the trial court, either, acceptance of remittitur or a new trial, and that choice had to be made by the filing (not faxing) of a written acceptance in a timely manner in order to avoid a new trial. A new trial was then irrevocably ordered when Gomez failed to timely file his written acceptance of remittitur by 4:30 p.m., May 25, 2001. Thus, the filing of his written Acceptance of Remittitur on May 31, 2001 was too late and a new trial has been ordered in this case.

Finally, Gomez' claim of technical mistake is especially lame. This court's record shows on its face that his failure to timely file a written acceptance of remittitur was no technical violation of an after-trial order. The court's order did not request nor did it authorize

a response by fax. Gomez' failure to accept remittitur by a written filing within the time and by the method specified in the trial court's Amended Order resulted in the unconditional relinquishment and waiver of his right to any remittitur and, together with the failure to file a timely notice of appeal, ended any appellate court jurisdiction of this case. The further suggestions that CDI was not prejudiced by this "technical mistake" is just plain wrong. Failure to follow the requirements of court orders and deadlines is hardly laudable and ignores the prejudice to CDI that such practices engender. Gomez' attempt to justify these actions are simply erroneous. Accordingly, his arguments and rationale on this point should be rejected leaving this court with no alternative but to remand this case back to the trial court for a new trial on all issues.

III. THE TRIAL COURT DID ERR AND PLAINTIFF'S EXHIBIT 46 WAS IMPROPERLY ADMITTED INTO EVIDENCE BECAUSE THIS VIDEOTAPE EXHIBIT RELATED SOLELY TO POST-ACCIDENT CONDUCT ON THE PART OF DEFENDANT, IT WAS NOT RELEVANT TO ANY ISSUE IN THE CASE AND IT WAS MANIFESTLY PREJUDICIAL TO DEFENDANT.

ARGUMENT

Plaintiff's Exhibit 46 was a videotape purported to depict the accident scene prepared on behalf of Gomez and made one day after the accident in question. When it was offered, trial counsel for CDI unsuccessfully objected on the ground that it constituted post-accident evidence of subsequent remedial conduct and was not relevant. In addition, it was argued that the bright yellow "**CAUTION**" tape depicted in the videotape surrounding the accident scene was prejudicial and that this exhibit was offered only for the purpose of showing CDI's negligence and fault for this accident and its failure to warn Gomez of a dangerous condition (Tr. 53-56).

CDI had previously filed a Motion in Limine to exclude Exhibit 46 as irrelevant and prejudicial and registered timely and appropriate objections as to its admissibility (L.F. 15-17). All of these objections were overruled, and the trial court allowed the jury to watch a four-minute color videotape of the accident scene with almost two minutes of footage depicting a bright yellow "**CAUTION**" tape clearly pictured, surrounding and wrapped around

the grating where Gomez fell. This videotape was shown at the same time as Glenn Frost, Gomez' first witness and supervisor at the accident site, narrated a description of the accident scene (Tr. 52-57). Gomez speculates in his substitute brief by the twisted logic that since no mention was made at trial of this bright yellow "**CAUTION**" tape and it was "of the type frequently found at accident sites during the pendency of an investigation" then "if the jury noticed it at all, it was probably assumed to have been placed there to aid in the investigation" (Sub. Br. 51). Gomez also proceeds to dilute the damage and prejudicial effect of this videotape by claiming that "[t]here was no testimony or argument that had the tape been there when defendant's employees pulled the grate out from under Gomez that the accident would have not occurred" and that "the tape was not identified nor mentioned in any way by any witness; nor bid Gomez' counsel refer to the yellow tape in her argument" (Sub. Br. 52). There was absolutely no evidence and Gomez offers no transcript reference to support the statement that "defendant's employees pulled the grate out from under Gomez." In any event, this argument misses the point and demonstrates that this after the fact evidence was totally irrelevant and transparently introduced to prejudice the defendant. Without the admission of this evidence there is no need to speculate as to its effect on the jury.

While contending that the videotape does not show evidence of subsequent remedial acts or imply negligence, Gomez then proceeds to argue for the admissibility of this exhibit as post-remedial measure evidence. These arguments are contradictory. Gomez' reference to Rule 407, Federal Rules of Evidence, correctly points out the inadmissibility of such

evidence as well as those circumstances when evidence of subsequent remedial measures is not excluded from evidence. However, Gomez does not contend that any of these exceptions apply in the instant case. This argument is both perplexing and inexplicable. On the one hand, Gomez argues that such evidence is inadmissible to prove antecedent negligence and then posits that this exhibit was intended to help the jury visualize the accident scene. Clearly this exhibit of post-remedial measures was offered to show warnings of the dangerous area and negligence on the part of CDI.

Gomez next argues that the yellow "**CAUTION**" tape somehow does not fall within the definition of subsequent remedial repair. Gomez bases this claim on the convoluted premise that there was no explanation given as to how or why the tape was placed in the accident scene area, that it was doubtful that the jury even saw the tape in that manner and that the jury probably assumed that it was placed there to mark off the location of the injury (Sub. Br. 56). The simple fact here is that we do not know what was in the minds of the jury when this evidence was allowed to be presented in this case. No argument is being made in this case that this videotape did not purport to reflect the condition of the accident scene or the grate flooring when Gomez fell. Accordingly, Exhibit 46 was obviously prejudicial, cumulative, and offered only for the purpose of showing that CDI was negligent and at fault in this case. Gomez misses the point of CDI's argument of error. The issue here is not about helping the jury visualize the scene but, instead, whether or not the videotape, taken after the accident and containing a bright yellow **"CAUTION"** tape, is prejudicial evidence of post-accident remedial measures. Once

this strawman is disposed of the only proper justification for this evidence is its pertinence to negligence on the part of defendant.

Aware that he is on thin evidentiary ice, Gomez next attempts to find a foundation for this videotape elsewhere in the record but the resulting exercise actually reveals the extent to which the prejudice of this videotape tainted this case. Gomez seeks to shield this prejudicially erroneous evidence by claiming that the videotape was also admissible because of the discrepancy concerning the condition of the grating at the time he fell. Gomez fails to note, however, that there was no discrepancy in the record when this evidence was offered concerning the condition of the grating at the time Gomez' fall. Mr. Frost was Gomez' first fact witness in the case and at the time of his testimony there had been no evidence presented as to this issue. The assertion that CDI attempted to argue Gomez' comparative fault and that there was a dispute as to the condition of the accident site came in CDI's portion of the case, long after the introduction of Exhibit 46 and even after the close of plaintiff's evidence. Clearly, the damage and prejudice was already accomplished by the admission of this evidence long before CDI's portion of the case. The condition of the accident scene and surrounding area were not in dispute and this videotape was not a necessary foundation for admitting any subsequent evidence. The only issue was how the accident happened. These facts are identical to the facts in ***Brooks v. Elders, Inc.***, 896 S.W.2d 744 (Mo.App. E.D. 1995) where the Missouri Court of Appeals, Eastern District, upheld the trial court's exclusion of similar

evidence finding that the prejudicial effect to the defendant outweighed any probative benefit of admitting this type of evidence.

Accordingly, it is clear under the facts and the law that Exhibit 46 was improperly used to prove culpability and was manifestly prejudicial to the defendant. The prejudicial nature of this videotape was evident and the jury's verdict reeks of passion and prejudice and the videotape obviously contributed to that attitude requiring the granting of a new trial in this case.

IV. THE TRIAL COURT DID ABUSE ITS DISCRETION WITH ITS REMITTED JUDGMENT BECAUSE THE COMPENSATORY DAMAGE JUDGMENT, EVEN AS REMITTED, IS GROSSLY EXCESSIVE BY ANY STANDARD SO AS TO SHOCK THE CONSCIENCE OF THIS COURT AND THIS COURT CANNOT CORRECT THE ERRONEOUS AND PREJUDICIAL VERDICT BASED UPON THE EVIDENCE PRESENTED IN THIS CASE

ARGUMENT

In its opening brief, CDI stated that under ***Larabee v. Washington***, 793 S.W.2d 357 (Mo. App. W.D. 1990), review of the compensatory damage award in this case for excessiveness requires that this Court consider the evidence and verdict in this case in light of, among other things, Gomez' age, loss of income, present and future medical expenses, nature and extent of injuries and economic factors. Recognizing that there is no exact formula for determining whether an award of compensatory damages is excessive, each case must be considered on its own set of facts. ***Callahan v. Cardinal Glennon Hosp.***, 863 S.W.2d 852 (Mo. banc 1993).

It is submitted that at trial and under the set of facts of this case there was no substantial evidence of Gomez' life expectancy, lost earnings (past, future or present value thereof) or any testimony of past or future medical expenses (or their reasonableness and necessity) from his

treating doctors and health care providers to support the verdict returned or the Court's remittitur. Under § 537.068 R.S.Mo., a remittitur is designed to rectify a verdict that exceeds fair and reasonable compensation for Gomez' injuries and damages based upon the evidence presented at trial. Accordingly, the issue presented here is whether the Court's remittitur cured the problem that clearly plagued the jury's verdict. It is obvious that the verdict was excessive, without support in the record, and the product of bias and prejudice requiring remittitur. However, even as remitted, under the facts of this case, the judgment of the trial court still did not and cannot correct the erroneous and prejudicial verdict and grossly excessive judgment based upon the evidence and facts presented in this case.

Gomez does not cite a single reference in the record or transcript that even remotely approaches support for the size of the verdict or remittitur in this case. Instead, he maintains that evidence of "multiple substantial injuries and damages attributable to the negligence of Construction Design Inc." was presented at trial (Sub. Br. 59). However, once and again and characteristically, there are no transcript references or support anywhere in the record that would allow this argument to stand. Notably absent from Gomez' argument is the fact that the evidence was clearly disputed with respect to the nature, extent and permanency of his injuries, pain and suffering, and the medical expenses and economic loss attributable to his injuries. More significantly, because there was no such evidence presented, Gomez' counsel could not and did not request a verdict amount from the jury in her closing argument. Viewed in a light most favorable to Gomez, it is impossible to make any determination from the facts and record

in this case as to how the jury arrived at such an undeniably excessive verdict. Under these circumstances, it is obvious that even the remitted judgment of the trial court was incapable of correcting an erroneous and prejudicial jury verdict based upon the evidence presented in the case and that even as remitted the judgment is still so excessive as to shock the conscience of this Court. ***Coleman v. Ziegler***, 226 S.W.2d 388, 393 (Mo. App. St.L.App. 1950).

Next, Gomez would have this Court judge the excessiveness of the damages awarded by the jury below by doing the same thing the jury and trial court did in this case; i.e., engage in conjecture and speculation as to both causation and damages. Even given the discretion afforded juries to assess damages and trial courts to exercise their power of remittitur, a personal injury award over 20 times greater than any amount that could be inferred from the evidence as economic and non-economic loss and a remitted judgment over 16 times greater than any inferred loss most certainly must "shock the conscience" of this Court so as to warrant a new trial or further remittitur in this case. If our appellate courts do not apply the brakes to instill some modicum of rationality in personal injury verdicts spun out of control by trial courts, as here, that improperly submit cases to juries without sufficient proof of causation and damages leaving the jury to find and assess damages based upon speculation and conjecture, the adverse consequences recently predicted by the Second Circuit will surely come to pass: "One excessive verdict, permitted to stand, becomes precedent for another still larger one." ***Consorti v. Armstrong World Industries, Inc.***, 72 F.3d 1003 (2d Cir. 1995), vacated 116 S.Ct. 1589 (1996).

The jury's verdict in this case, compounded by the trial court's abuse of discretion when it remitted the judgment is explainable only as a product of passion and prejudice. Although bias, passion and prejudice are usually difficult to trace, there is no such mystery in this case. For whatever reason, and certainly not based upon any evidence or proof of damages, something ignited the fires of passion and prejudice that produced a verdict that is unexplainable in any other terms. Clearly, a new trial is required by this mammoth and unsupportable verdict that can be attributable only to the poison injected into the case by evidence of disputed injuries unsupported by any proof of damages, post-accident remedial measures of the accident scene that prejudicially and erroneously implied fault on the part of CDI in failing to warn Gomez of the dislodged grating and the plain error committed by the trial court in submitting a verdict director which failed to require the jury to find the necessary elements in order to return a verdict for Gomez.

Alternatively, even if a new trial is not ordered here, this Court should enter at least an even more substantial remittitur to eliminate the excessiveness of this judgment and to bring it in line with the evidence presented at trial. Whatever yard stick is used, the award of $2,760,000 for compensatory damages in this case is miles beyond anything what could arguably be called reasonable under the evidence presented in this case. CDI submits that this Court can interfere with the trial court's Order of Remittitur by finding that both the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion. The trial court will be deemed to have abused its discretion when the remitted judgment is still so excessive

as to shock the conscience of the Court. ***Barnett v. La Societe Anonyme Turbomeca***, 963 S.W.2d 639 (Mo.App. W.D. 1997).

Finally, CDI submits even the remitted judgment in this case cannot correct the erroneous and prejudicial verdict based upon the evidence in this case. The trial court's remittitur order was but a small step in an effort to cure what it correctly perceived as a gross inequity. Recognizing that the trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, it is clear from the record before us that there was no evidence to support this verdict or even the remitted amount. Accordingly, this result leads to no other conclusion but that the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion so shocking to the conscience of this Court as to require a new trial of this case or, at the very least, a more substantial remittitur to eliminate the excessiveness of this judgment and to bring it in line with the evidence presented at trial.

V. THE TRIAL COURT DID ERR IN OVERRULING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE PLAINTIFF DID NOT PRESENT SUBSTANTIAL EVIDENCE FOR EVERY FACT ESSENTIAL TO LIABILITY ON THE NEGLIGENCE THEORY PLEADED OR SUBMITTED IN THIS CASE

ARGUMENT

In order to make a submissible case, Gomez had to present substantial evidence for every fact essential to liability. ***Jacobs v. Bonser***, 46 S.W.3d 41, 48 (Mo.App. E.D. 2001). In any negligence action, the plaintiff must establish the existence of a duty on the part of the defendant to protect the plaintiff from injury, failure of the defendant to perform that duty, and that the plaintiff's injury was proximately caused by the defendant's failure. ***Seitz v. Lemay Bank & Trust Co.,*** 959 S.W.2d 458, 463 (Mo. banc 1998). Here, to recover on his negligence claim, Gomez had to show, by substantial evidence, that CDI owed him a duty at the time of his injury. CDI maintains that Gomez failed to satisfy this element because it was not under a duty to make the area safe for Gomez at the time of his injury in that it did not have any responsibility for and control over the area in which he was injured. Aware that he is on thin evidentiary ice, Gomez continues to take liberties with the evidence and record by contending without any transcript references that "control was not an issue," "that control was undisputed"

and that "[i]t was never in dispute in this case" (Sub. Br. 71-73). Gomez never proved either in his or CDI's portion of this case a key element for submissibility on the issue of subcontractor liability, i.e., that CDI had control and responsibility of the grating and area within the grating. See ***Mino v. Porter Roofing Co.,*** 785 S.W.2d 558 (Mo.App. W.D. 1990). In fact, in Gomez' portion of the case, there was no evidence that CDI created a dangerous condition.

Gomez, through the trial and appeal as well as in his brief, continues to misconceive the position of CDI with respect to the submissibility of this case. Gomez' substitute brief does not respond to the position of CDI that Gomez did not make a submissible case for jury determination either in his portion of the case or at the close of all of the evidence; i.e., Gomez failed to prove the elements necessary to overcome CDI's motion for directed verdict at both the close of Gomez' evidence and at the close of all of the evidence. More importantly, Gomez' chosen theory of submission, *res ipsa loquitur* (M.A.I. 31.02(3)), was also not supported by the evidence. Despite all of these irregularities at trial Gomez continues to contend without any evidentiary support from the transcript that he proved specific acts of negligence on the part of CDI that made a submissible case.

The evidence in Gomez' portion of the case as to how the accident occurred came only from his co-employees, Frost and Fry (Tr. 49-95). Neither Frost nor Fry witnessed the accident. In fact, Gomez himself admitted that he did not remember the accident or anything else following the accident (Tr. 303-305) and his entire testimony was confined merely to his

injuries. It is clear from a review of this testimony and the other testimony that followed in CDI's portion of the case that Gomez failed to sustain his burden of presenting any substantial evidence that CDI was negligent under either a specific negligent submission or *res ipsa loquitur* or that CDI's negligence caused Gomez' injuries. Rather, Gomez makes various inaccurate and misleading statements which do not stand up to close examination of the transcript citations or record in this case. It is important to point out here that the version of the facts in Gomez' substitute brief that he claims supports a submission of specific negligence on the part of CDI (and not a *res ipsa loquitur* submission) mixes the entirety of the evidence presented at trial, thus, making it impossible for this Court to separate the evidence in Gomez' case from the evidence presented in CDI's case without a careful review of the transcript. By way of example, almost every transcript reference used to support Gomez' argument for submissibility is found in CDI's portion of the case (Tr. 338 - 422). Accordingly, it is important to first sort out what was pleaded and presented in Gomez' case from the evidence that was presented in CDI's case and then examine the evidence presented in support of Gomez' ultimate submission of *res ipsa loquitur* . After such a review, it will be clear that Gomez failed to meet his burden of proof in all respects.

A. <u>Gomez' Petition For Damages Pled Specific Acts Of Negligence Only On The Part Of CDI, Including A Failure To Inspect The Grating, A Failure To Properly Secure The Grating During Removal Of The Heat Exchanger; And A Failure To Give Timely Warnings Of The Dislodged Grating (L.F.</u>

1-5) And Gomez' Petition For Damages Made No Mention Of *Res Ipsa Loquitur* Nor Did He Allege Facts, Which If True Would Invoke The Doctrine, Which Requires That: (1) The Incident Resulting In Injury Is The Kind Which Ordinarily Does Not Occur Without Someone's Negligence; (2) The Incident Is Caused By An Instrumentality Under The Control of The Defendant; And (3) The Defendant Has Superior Knowledge About The Cause Of The Accident. *Roebuck v. Valentine-Radford, Inc.*, 956 S.W.2d 329, 334 (Mo.App. W.D. 1997).

It was admitted at trial and there is no dispute that both Gomez' employer and CDI were subcontractors on this job site. Both of Gomez' co-employees Frost and Fry testified that the area where the grating was dislodged was a common area through which Gomez and his co-employees had been working. This fact was also confirmed in CDI's portion of the case. Neither Frost nor Fry established that CDI unlatched or unfastened the grating where Gomez fell and there was no evidence in Gomez' case as to what responsibility, if any, CDI may have had for the work it was performing on the project. Frost admitted that he had no contact with CDI or any of its employees about what it was doing on the job site (Tr. 59-65) and Fry also confirmed that he too had never had any contact with CDI prior to the accident (Tr. 82). Gomez' repeated references in his argument implying responsibility and some duty owed to him by CDI in the performance of its work on this project site is never supported by any transcript references in Gomez' substitute brief. Other than the videotape and a description

of the accident scene (none of Gomez' testifying witnesses were actual eye witnesses to the accident itself), there was simply no other evidence presented by Gomez in his portion of the case as to any proof of negligence or causation on the part of CDI. Gomez completely failed to establish in his portion of the case or in CDI's case who was in control of and had the duty and responsibility for the area where Gomez fell. Under **Mino** and **Guffey**, previously cited herein, this was Gomez' burden of proof under either a specific negligence or general negligence (*res ipsa loquitur*) submission. Accordingly, control was an element of Gomez' case under the submission of either theory and, whether under a theory of specific negligence or *res ipsa loquitur*, Gomez failed to present substantial evidence for every fact essential to liability and, therefore, failed to present substantial evidence to support the submission of negligence against CDI.

B. There Was No Direct Or Indirect Proof Presented At Anytime During The Trial As To Of CDI's Control, Right To Control, Management Of The Work Involved At The Time of Gomez' Accident Or That CDI Had Any Duty To Gomez Or That CDI Negligently Performed Its Duty To Gomez Or That CDI's Negligence Caused Gomez' Accident.

Gomez misconceives the position of CDI and its argument of what is necessary under Missouri law to make a submissible case under theories of either specific negligence or *res ipsa loquitur*. A review of all of the evidence presented at trial from the various fact witnesses merely demonstrates that Gomez fell through a hole created when a grate became dislodged

while a heat exchanger was being lifted by CDI's employees. In the end, this was the sum and substance of Gomez' evidence. While apparently arguing that he made a submissible case of specific negligence on this proof (Sub. Br. 67), it is clear that this evidence does not in and of itself establish negligence on the part of CDI or his submission under a theory of *res ipsa loquitur*. Gomez' argument that there was more evidence presented at trial to support this theory is not supported by the record and he offers no transcript references to support his position in this regard. As noted above, there must be proper evidence at trial, none of which was provided either in Gomez' case or at the close of all of the evidence, that established control and responsibility for the construction area where he was injured, a duty on the part of CDI to Gomez, a failure to perform that duty, and CDI's breach of that duty as the approximate cause of Gomez' accident and injuries in this case. Gomez not only failed to prove the elements of any specific acts of negligence on the part of CDI as pleaded in his petition but he also failed to prove the necessary element of control under a *res ipsa loquitur* submission.

Gomez' reliance upon the trial court's comments during the argument on CDI's motion for directed verdict at the close of Gomez' evidence (Tr. 335) is misplaced and also demonstrates both Gomez' and Judge Wells' misunderstanding of the evidence. Contrary to the court's comments and recollection of the trial testimony, there was no evidence ever presented by any witness in Gomez' case (or in CDI's case) that "he was either standing on or getting ready to step on the grate when it was pulled out from underneath him and he fell through" (Tr. 335). Judge Wells didn't get it and Gomez still doesn't understand the

insufficiencies in the evidence and proof he presented at trial. Moreover, Judge Wells, like Gomez in his substitute brief, incorrectly reasoned and characterized the claim in this case as one being submitted on a failure to warn theory which was also neither supported by the evidence in Gomez' portion of the case nor the theory of liability (*res ipsa loquitur)* submitted to the jury by the instructions.

Finally, Gomez' assertion that there was evidence of control of the premises by CDI is a distortion of the facts which is borne out by a review of the testimony of the witnesses. Gomez makes general statements to this effect but without any transcript reference which further demonstrates the fallacy of his argument. Contrary to his contentions, testimony of work being performed in the area of this accident by the various witnesses does not equate to control as suggested by Gomez in the substitute brief. Gomez simply misunderstands the law and the burden of proof requirements of his case, whether submitted under specific negligence or *res ipsa loquitur* theories. CDI did not argue about control at trial because it was Gomez' burden to prove such control. Gomez failed to meet this burden. Any suggestion that control was undisputed in this case and was not an issue (Sub. Br. 71-73) is simply false and the fact that Gomez provides no transcript testimony in support of this position is the proof of this point. Gomez improperly implies and must argue this position because he knows that there was never any proof of control and responsibility over the work area involved and that this element must be established in order to make a submissible case under either specific negligence or *res ipsa loquitur*.

In summary, Gomez' substitute brief fails to come to grips with CDI's arguments for one telling reason — he does not meet the threshold requirements on the record made at trial for any submissible negligence claim against CDI. Gomez failed to make a submissible case of either specific negligence or *res ipsa loquitur* because he failed to satisfy the elements necessary for either submission; i.e., a duty to plaintiff, the breach of that duty, breach of that duty causing harm to plaintiff or defendant's control, right to control or management of the premises involved. Accordingly, for these additional reasons, Gomez' assertion that a submissible case was made based upon the content of the testimony of the witnesses simply disappears and, therefore, the requisite elements are missing and this case should be reversed and judgment entered for CDI.

VI. GOMEZ' ADDITIONAL CLAIM RAISED FOR THE FIRST TIME ON APPEAL THAT CDI SHOULD NOT BE GRANTED ANY FURTHER REMITTITUR BECAUSE CDI COMMITTED FRAUD AND DECEIVED GOMEZ IN THE TRIAL COURT BY DISCLOSING ADDITIONAL INSURANCE COVERAGE IN SUPPLEMENTAL INTERROGATORY ANSWERS FILED AFTER THE JUDGMENT IS FALSE AND CANNOT BE CONSIDERED BY THIS COURT BECAUSE:

(1) THIS CLAIM WAS NEITHER PLEADED NOR PRESENTED TO THE TRIAL COURT IN ANY WAY;

(2) THERE WAS NO EVIDENCE PRESENTED TO OR PROPERLY BEFORE THE TRIAL COURT ON THIS ISSUE; AND

(3) THERE IS NOTHING IN THE RECORD ON THIS ISSUE PRESERVED FOR APPELLATE REVIEW

ARGUMENT

Gomez would have this Court judge the excessiveness of the damages awarded by the jury and later remitted by the trial court by falsely claiming that CDI committed fraud and deceived the trial court by not disclosing the entire extent of its insurance coverage until after judgment was issued in this case. This argument lacks any merit and is meant only to prejudice CDI before this Court when considering its arguments as to the prejudicial error committed

by the trial court and the defects in Gomez' case requiring a new trial be granted in this matter. It is obvious that this duplicitous argument has only been advanced by Gomez in order to place before this Court the extent of CDI's insurance coverage for this claim when considering CDI's request for a reversal or new trial of this case. This deplorable and outrageous attempt on the part of Gomez to further prejudice CDI must be disregarded and rejected.

First, this argument is improperly based upon information and pleadings never presented to or considered by the trial court and, therefore, may not be introduced into the record on appeal ***Marc's Restaurant Inc. v. CBS, Inc.***, 730 S.W.2d 582, 584 (Mo.App. E.D. 1987). Likewise, this Court must disregard any reference to documents in respondent's brief to the extent that they were not before the trial court in this matter. ***Lay v. St. Louis Helicopter Airways, Inc.***, 869 S.W.2d 173 (Mo.App. E.D. 1973). Additionally, since the argument is based on documents not in the record, the entire argument should be rejected and stricken from Gomez' substitute brief.[3]

Second, Gomez inappropriately and unprofessionally suggests that CDI's supplementation of its discovery responses was the product of fraud and deceit that should prevent the granting of a new trial or any further remittitur in this case. This argument is outrageous, contravenes all logic and is truly not worthy of any response. CDI categorically

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[3]A Motion to Strike Portions of Respondent Cross-Appellant's Substitute Brief and Addendix with supporting Suggestions have been filed by Construction Design Inc. and are currently before this Court for consideration.

denies that it has committed any fraud or deceived Gomez and the Court in any way whatsoever with regard to the supplemental interrogatory responses concerning its insurance coverage. Gomez and his counsel were well aware, based upon settlement discussions before and after trial, that the settlement demand and the remitted judgment were within the limitations of insurance coverage. This desperate ploy offers nothing but an attempt to inject as an issue CDI's insurance coverage and additional prejudice on CDI in this case. This type of argument should not be permitted and must also be rejected.

The liberties taken by Gomez with regard to these arguments are egregious distortions of the facts and, obviously, an improper attempt to place before this Court the amount of insurance coverage available in the case and the nature and status of settlement negotiations between the parties in hopes of influencing its decision making in this appeal. This highly improper tactic is meant only to further prejudice CDI in its attempt to obtain a new trial in the case. This court cannot accept these false and misleading recitals and statements as a substitute for the record in its review of the trial court's judgment. ***McDonald v. Thompson***, 35 S.W.3d 906, 909 (Mo. App. S.D. 2001). The documents referenced in Gomez' argument and attached to his Appendix as well as the mischaracterization of events described in his substitute brief were not part of the trial court record in this case. Neither evidence of settlement discussions nor these discovery responses or letters regarding settlement were ever introduced or made a part of the Court's record in this case. Indeed, because the law favors settlements, it is well known that evidence regarding settlement negotiations are excluded

because such efforts should be encouraged and the party making an offer of settlement should not be penalized by revealing the offer if the negotiations fail to materialize. ***Stan Cushing Const. v. Cablephone, Inc.***, 816 S.W.2d 293, 295 (Mo.App. S.D. 1991), citing ***Owen v. Owen***, 642 S.W.2d 410, 414 (Mo.App. S.D. 1982).

Contrary to Gomez' protestations, there has been no prejudice to him. His settlement demands before and after trial were always within the coverage limits originally reported and as later identified in CDI's supplemental interrogatory answers. Any future concern of Gomez on this issue could have easily been taken up with the trial court both prior to and during this appeal. See Rules 61.01, 74.06 and 75.01, Mo.R.Civ.P. Perhaps the more telling portion of Gomez' argument and the misstatements and prejudice he intends to promote before this Court is his tacit admission that he suffered no harm or prejudice since all settlement offers of CDI were rejected by him.

In summary, the argument and assertions contained in Gomez' substitute brief on this point strain credulity to intolerable limits and far exceed the boundaries of acceptable professional conduct. Accordingly, under these circumstances, Gomez' argument must be disregarded as fundamentally and legally improper and as an unashamed misstatement and distortion of the record that should be stricken from his substitute brief.

CONCLUSION

Construction Design Inc.'s Substitute Brief, Reply Brief and Response to Plaintiff's Cross-Appeal set forth accurate statements of facts, properly advise the reviewing court wherein and why the ruling of the lower court is deemed to be erroneous and contain specific page references to the legal file and transcript as required by appellate court rules. Accordingly, for the reasons as stated in its Substitute Brief, Reply Brief and Response to Plaintiff's Cross-Appeal, the judgment of the Circuit Court of Jackson County, Missouri should be reversed and the case remanded with directions to enter judgment for defendant or to conduct a new trial on all issues.

Respectfully submitted,

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Douglas N. Ghertner #22086
SLAGLE, BERNARD & GORMAN, PC
4600 Madison Avenue
Suite 600
Kansas City, Missouri 64112-3012
Phone: (816) 410-4600
Fax: (816) 561-4498
E-Mail: dghertner@sbg-law.com

John M. Graham, Jr. #46684
LAW OFFICES OF STEPHANIE WARMUND
9200 Ward Parkway, Suite 300
Kansas City, Missouri 64114
Phone: (816) 361-7917
Fax: (816) 523-8682

ATTORNEYS FOR DEFENDANT CONSTRUCTION DESIGN, INC.